

² Appellant submitted evidence with his appeal to the Board. The Board's review is limited to evidence that was in the record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On August 9, 2014 appellant, then a 41-year-old tractor-trailer operator, filed a traumatic injury claim alleging that on July 17, 2014 he injured his lower back when he slammed onto the driver's seat when driving over a bump in the road. He stopped work on August 11, 2014. Edward Grey, supervisor of distribution operations, challenged the claim. In August 25, 2014 correspondence, Celeste Eckford, a human resources specialist at the employing establishment, controverted appellant's claim. She advised that appellant did not work on July 17, 2014 and, therefore, the accident did not occur in the performance of duty. She stated that appellant returned to work on July 19, 2014 following military duty, and he worked continuously until August 9, 2014 when he reported an alleged July 17, 2014 injury. Appellant indicated that he required surgery which was scheduled for September 11, 2014, and that he had submitted no medical documentation.

Mr. Grey completed an OWCP Form CA-16, authorization for examination and/or treatment, on August 11, 2014. He indicated that there was doubt whether the employee's condition was caused by employment.

By letter dated August 27, 2014, OWCP informed appellant of the evidence needed to support his claim. Appellant submitted handwritten notes dated August 9, 2014. He stated that at approximately 3:45 p.m., he hit a bad bump while driving the postal tractor-trailer at approximately 40 miles per hour and was launched into the roof of the tractor and landed extremely hard on the seat. Appellant stated that, after exiting the truck, he tried to walk off the pain and felt better. He claimed he did not want to stop work because of his financial situation, but ultimately concluded that his back was too sore to work. Appellant further stated that he had seen a doctor and did not need any assistance at that time.

A duty status report from a neurosurgeon with an illegible signature dated August 4, 2014 stated that appellant had a herniated lumbar disc and that he could not work due to pain. On disability slips dated August 11 and 29, 2014 Dr. Ewa Solski, Board-certified in family medicine, advised that appellant should be off work because he was scheduled for surgery.

On September 3, 2014 Nena Sanders, a health resource manager at the employing establishment reiterated that the claim was challenged. She again indicated that appellant was not in pay status on the claimed date of injury. On Thursday, July 17, 2014 appellant was in leave-without-pay (LWOP) status. Friday, July 18, 2014 was his regularly scheduled day off. On July 19, 2014 appellant was on military leave, and that Sunday, July 20, 2014, was a scheduled day off. He returned to work on July 21, 2014 and continued to work until August 3, 2014, at which point he was in LWOP status until he returned to work on August 7, 2014. Appellant then worked until Saturday, August 9, 2014 when he stopped work and did not return. On that date, he submitted the claim form.

Ms. Sanders submitted an August 6, 2014 consultation report in which Dr. Kenneth W. Ward, a Board-certified physiatrist, noted appellant's complaint of radiating back pain and his report that the pain began two weeks earlier when he was driving a tractor-trailer at work and had then visited an emergency room. Physical examination of the lumbosacral spine demonstrated moderate restricted lumbar extension with pain and tenderness to palpation of the

left paraspinals. Dr. Ward reviewed a July 22, 2014 magnetic resonance imaging (MRI) scan of the lumbar spine that demonstrated a left-sided disc extrusion at L5-S1, evidence of prior surgery, and right L5-S1 foraminal stenosis due to spondylosis with impingement of the L5 nerve root. He diagnosed acute left S1 radiculopathy, depression, history of lumbar laminotomy, gait disturbance, and decrease in functional status.

By decision dated September 29, 2014, OWCP denied the claim because the evidence did not establish that the injury occurred as alleged. Appellant requested reconsideration on October 20, 2014 and submitted additional medical evidence.

In an August 21, 2014 treatment note, Dr. Peter Navarro, a resident physician in physical medicine and rehabilitation, reported an eight-month history of low back pain that had increased since appellant hit a bump in the road while driving a truck several months previously. Appellant reported previous surgery at L4-5, stating that he was relieved of low back pain until the recent incident. Dr. Navarro provided physical examination findings, reviewed the MRI scan study, and diagnosed L5-S1 disc herniation. He noted that appellant would like to proceed with surgery.

On a discharge summary dated September 29, 2014, Dr. Howard B. Levene, a Board-certified neurosurgeon, noted that appellant was admitted on September 23, 2014 and that appellant was discharged the next day with a primary diagnosis of lumbar herniated disc. He indicated that microdiscectomy surgery was performed on September 23, 2014 and appellant was discharged with full strength in all extremities and no apparent deficits. On October 10, 2014 Dr. Levene examined appellant in a postoperative neurosurgery clinic visit where he reported that appellant felt better than before the surgery but still had radiating pain. Dr. Levene stated that appellant would be discharged after a two-month follow-up visit. Appellant gave him a history that while at work he was driving his truck and he hit a dip in the road after which he felt a twinge in his back. This caused him pain. Dr. Levene related that appellant had an MRI scan study and computerized tomography (CT) scan studies which were consistent with a herniated disc at L5-S1. He noted appellant's history of a prior surgery, and advised that this could be an exacerbation or reherniation of his disc. Dr. Levene concluded, "it is more likely than not that this herniated or reherniated disc results from his vehicle hitting the large dip in the road which he described occurring during his work duties."

In a nonmerit decision dated November 12, 2014, OWCP declined to review the merits of appellant's claim. It found the new evidence irrelevant to the issue of whether appellant sustained an injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 1

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee/employer relation. Instead, Congress provided for the payment of compensation for the disability or death of an employee resulting

from personal injury sustained while in the performance of his duty.³ The phrase while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers compensation law of arising out of and in the course of employment.⁴ In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto.⁵ The course of employment relates to the elements of time, place, and work activity.⁶ An employee seeking benefits under FECA has the burden of proof to establish by reliable, probative, and substantial evidence the essential elements of his or her case.⁷

ANALYSIS -- ISSUE 1

Appellant's injury did not occur at a time when one could reasonably say he was engaged in his employer's business. On the claim form he indicated that the injury occurred on July 17, 2014. Both Ms. Eckford and Ms. Sanders of the employing establishment indicated that appellant was not at work on July 17, 2014. Appellant submitted no evidence substantiating that he was at work on July 17, 2014, the date of the claimed injury.

Appellant has failed to establish a fundamental element of a FECA claim -- that the claimed incident occurred at a time when the employee may reasonably said to be engaged in the master's business.⁸ He therefore did not establish that he sustained an injury in the performance of duty on July 17, 2014.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹⁰ Section 10.608(a) of the Code of Federal Regulations provide that a

³ 5 U.S.C. § 8102(a); *Angel R. Garcia*, 52 ECAB 137 (2000).

⁴ *D.L.*, 58 ECAB 667 (2007).

⁵ *See R.C.*, 59 ECAB 427 (2008).

⁶ *Howard W. Faverman*, 57 ECAB 151 (2005).

⁷ *S.B.*, 58 ECAB 398 (2007).

⁸ *Supra* note 6.

⁹ The Board, however, notes that where, as in this case, an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. 20 C.F.R. § 10.300(c).

¹⁰ 5 U.S.C. § 8128(a).

timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).¹¹ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹² Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS -- ISSUE 2

With his October 20, 2014 reconsideration request, made on an OWCP appeal rights form, appellant merely checked that he was requesting reconsideration. He did not allege or contend that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁴

With respect to the third requirement under section 10.606(b)(2), appellant submitted additional medical evidence concerning his lumbar condition and surgery. This evidence is not relevant to the underlying issue in this case as to whether appellant was in the performance of duty when the claimed July 17, 2014 incident occurred.¹⁵

Appellant has not established that OWCP erred in applying a point of law, has not advanced a relevant legal argument not previously considered, or submitted relevant and pertinent new evidence not previously considered by OWCP. OWCP properly denied her reconsideration request.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

¹¹ 20 C.F.R. § 10.608(a).

¹² *Id.* at § 10.606(b)(3).

¹³ *Id.* at § 10.606(b).

¹⁴ *Id.* at § 10.606(b)(2).

¹⁵ *Supra* note 6.

CONCLUSION

The Board finds that appellant has failed to establish an injury in the performance of duty on July 17, 2014. The Board further finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 12 and September 29, 2014 are affirmed.

Issued: April 27, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board